Supreme Court, U.S.
FILED

01 967 DEC 21 2001

NO.: OFFICE OF THE CLERK

In The

Supreme Court of The United States

JOSE A. PEREZ MENCHACA,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Jose A. Perez Menchaca
P.O. Box 1031
Coleman, FL 33521-1031

Petitioner.

49pp

QUESTIONS PRESENTED

1. Whether the indictment was insufficient because it failed to state a criminal offense where petitioner was charged with selling gamma butyrolactone ("GBL") and by so doing, conspired to violate the Food, Drug, and Cosmetic Act ("FDC Act") by introducing a misbranded drug into interstate commerce?

2. Whether petitioner's conviction is due to be vacated because the definition of misbranded drug under the FDC Act is unconstitutionally vague as applied to his case?

3. Whether petitioner's guilty plea is due to be vacated where the district court did not inform him, nor did he know, that he was pleading guilty to a felony or misdemeanor?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 6

I. PROCEDURAL HISTORY 6

II. FACTS 7

REASONS FOR GRANTING THE PETITION 9

CONCLUSION 18

APPENDIX 19

TABLE OF CONTENTS - Continued

Appendix A: Unpublished opinion of the Eleventh Circuit Court of Appeals, dated September 27, 2001 ..... App.1

Appendix B: Judgment Including Sentence Under the Sentencing Reform Act dated January 17, 2001 ..... App.9

TABLE OF AUTHORITIES

SUPREME COURT CASES:

Bouje v. City of Columbia,
378 U.S. 347, 84 S.Ct. 1697 (1964) 14

City of Chicago v. Morales,
527 U.S. 41, 119 S.Ct. 1849 (1999) 12

Coates v. City of Cincinnati,
402 U.S. 611, 91 S.Ct. 1686 (1971) 11

Connally v. General Constr. Co.,
269 U.S. 385, 46 S.Ct. 126 (1926) 14, 15

Grayned v. City of Rockford,
408 U.S. 104, 92 S.Ct. 2294 (1972) 14

Gregory v. City of Chicago,
394 U.S. 111, 89 S.Ct. 946 (1969) 12

Hoffman Estates v. Flipside Hoffman Estates,
455 U.S. 489, 71 L.Ed. 2d 362, 102 S.Ct. 1186 (1982) .. 11

Kolender v. Lawson,
461 U.S. 352, 103 S.Ct. 1855 ..... 11, 12

TABLE OF AUTHORITIES - Continued

McCarthy v. U.S.,
394 U.S. 459, 89 S.Ct. 1166 (1969) 16, 17

Papachristou v. City of Jacksonville,
405 U.S. 156, 92 S.Ct. 839 (1972) 12

Parker v. Levy,
417 U.S. 733, 94 S.Ct. 2547 (1974) 11

Roberts v. United States Jaycees,
468 U.S. 609, 104 S.Ct. 3244 (1984) 12

Robinson v. State of California,
370 U.S. 660, 82 S.Ct. 1417 (1962) 12

Smith v. Goguen,
415 U.S. 566, 94 S.Ct. 1242 (1974) 11

U.S. v. Generix Drug Corp.,
460 U.S. 453, 103 S.Ct. 1298 (1983) 12, 13

U.S. v. Mazurie,
419 U.S. 544, 95 S.Ct. 710 (1975) 11

TABLE OF AUTHORITIES - Continued

U.S. v. Young,
470 U.S. 1, 105 S.Ct. 1038 (1985) 15

USV Pharm. Corp. v. Weinberger,
412 U.S. 655, 93 S.Ct. 2498 (1973) 13

U.S. COURT OF APPEAL CASES:
Pharmanex v. Shalala,
221 F.3d 1151 (10th Cir. 2000) 12, 13

U.S. v. Bell,
776 F.2d 965 (11th Cir. 1985) 16

U.S. v. Chubbuck,
252 F.3d 1300 (11th Cir. 2001) 15, 16

U.S. v. Hernandez,
896 F.2d 513 (11th Cir. 1990) 15

U.S. v. Quinones,
97 F.3d 473 (11th Cir. 1996)(*per curiam*) 16

TABLE OF AUTHORITIES - Continued

District Court Cases:
Pharmanex v. Shalala,
35 F.Supp.2d 1341, 1346 (D.Utah), *rev'd* 221 F.3d 1151 12

OTHER AUTHORITIES:
Fifth Amendment to United States Constitution 2, 15

Rule 11, Federal Rules of Criminal Procedure .. 15,16, 17

Title 18 U.S.C. § 1001 6

Title 21 U.S.C. § 321 ..... 3, 9, 10

Title 21 U.S.C. § 321(g)(1) 3, 10, 13

Title 21 U.S.C. § 321(g)(1)(A) 11

Title 21 U.S.C. § 321(g)(1)(B) 8, 9, 11

Title 21 U.S.C. § 321(g)(1)(C) 8, 9, 11

Title 21 U.S.C. § 321(g)(1)(D) 8, 9, 11

Title 21 U.S.C. § 331 ..... 4, 8, 9, 10

TABLE OF AUTHORITIES - Continued

Title 21 U.S.C. § 331(a) 6, 13

Title 21 U.S.C. § 331(c) 6

Title 21 U.S.C. § 331(k) 6

Title 21 U.S.C. § 333 ..... 5, 8-10

Title 21 U.S.C. § 333(a)(2) 6

Title 21 U.S.C. § 343(r) 3

Title 21 U.S.C. § 343(r)(1)(B) 3

Title 21 U.S.C. § 343(r)(3) 3

Title 21 U.S.C. § 343(r)(5)(D) 3

Title 21 U.S.C. § 343(r)(6) 3

Title 28 U.S.C. § 1254(1) 1

PETITION FOR WRIT OF CERTIORARI

Jose A. Perez Menchaca (Mr. Perez), respectfully prays for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on September 27, 2001.

OPINIONS BELOW

The unpublished opinion of the Eleventh Circuit Court of Appeals affirming Mr. Perez's conviction and sentence on direct appeal is reproduced in Appendix A hereto. The judgment and commitment order entered by the United States District Court for the Middle District of Florida - ORLANDO DIVISION, dated January 17, 2001, is reproduced in Appendix B.

JURISDICTION

This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1). This petition presents this Court with a serious constitutional question as well as a conflict with prior decisions of this Court as more fully presented below. The

instant petition is timely and filed within the 90 day statutory limitation period.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION: FIFTH AMENDMENT

Fifth Amendment - Rights of Persons

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; . . .

TITLE 21 U.S.C., SECTION 321

§ 321. Definition; generally

For the purposes of this chapter—

* * * * * * * * * * * *

(g)(1) The term "drug" means (A) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clauses (A), (B), or (C) of this paragraph. A food or dietary supplement for which a claim, subject to sections 343(r)(1)(B) and 343(r)(3) of this title or sections 343(r)(1)(B) and 343(r)(5)(D) of this title, is made in accordance with the requirements of section 343(r) of this title is not a drug solely because the label or the labeling contains such a claim. A food dietary ingredient, or dietary supplement for which a truthful and not misleading statement is made in accordance with section 343(r)(6) of this title is not a drug under clause (C) solely because the label or the labeling contains such a statement.

* * * * * * * * * * * *

TITLE 21 U.S.C., SECTION 331

§ 331. Prohibited acts

The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

* * * * * * * * * * * * *

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

* * * * * * * * * * * * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

* * * * * * * * * * * * *

TITLE 21 U.S.C., SECTION 333

§ 333. Penalties

(a) Violation of section 331 of this title; second violation; intent to defraud or mislead

(1) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

(2) Notwithstanding the provisions of paragraph (1), if any person commits such a violation after conviction of him under this section becomes final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both.

* * * * * * * * * * * *

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY.

On September 30, 1999, a federal grand jury for the Middle District of Florida - ORLANDO DIVISION, returned a 31-count Indictment against JOSE A. PEREZ MENCHACA ("Mr. Perez"), his privately owned Delaware corporation, BONDTECH-KLEBRIG CORPORATION ("Bondtech"), and PAUL CABANISS ("Mr. Cabaniss"), alleging violations of Title 18 U.S.C. § 1001 and Title 21 U.S.C. §§ 331(a), (c), and (k), and 333(a)(2) (Count I); violation of the Federal Food, Drug, and Cosmetic Act ("FDC Act")(Count II through VI); and further charging said defendants with transporting hazardous materials in air commerce (Counts VII through XI), mail fraud (Counts XII through XVIII), structuring monetary transactions (Counts XIX through XXVI) and making false statements to a federal agency (Counts XXVII through XXXI). Forfeiture was also sought.

On July 21, 2000, the district court below, upon the Government's motion, dismissed fifteen counts of the Indictment, (Counts VII through XVIII, and XXX through XXXI).

Pursuant to a written plea agreement, Mr. Perez entered his plea of guilty as to one count of the Indictment. On January 12, 2001, the district court below sentenced Mr. Perez to a term of 38-months imprisonment, three (3) years supervised release, and a $6,000 fine.

On September 27, 2001, the Eleventh Circuit Court of Appeals affirmed Mr. Perez s conviction and sentence by an unpublished opinion. *See* App. A(1). The mandate was issued by the Court on October 26, 2001.

The instant petition timely followed. Mr. Perez is currently serving his federal sentence at a federal correctional institution known as FCC-Coleman (LOW), Coleman, Florida. The Custodian is R.D. SWOPE.

II. FACTS.

In October, 1996, Mr. Perez established a website on the Internet, offering for sale alternative health products, *i.e.*, Dehydroepiandosterone ("DHEA"), Kemdalyn, Rodakinone, etc. The common reference or term of the aforementioned products was/is "Food Supplements."

A month later, Mr. Perez was offered an opportunity from a third party, via the Internet, to sell and distribute kits containing gamma butyrolactone ("GBL") and two other chemicals, sodium hydroxide and potassium hydroxide, through the mail in order to enable the end user to make gamma hydroxybutyrate ("GHB").

Mr. Perez consulted with his civil attorney regarding the laws regulating the aforementioned chemicals and subsequent sale to the general public, via the mails. Mr. Perez was informed by his counsel that there was no federal regulation prohibiting him from offering for sale and distributing to his customers GBL or GHB.

Thereafter, Mr. Perez began offering for sale the above described kits, advertising that GHB "cured alcoholism and depression, induced sleep and heightened sexual feelings, burned body fat, extended human life, and increased muscle size and mass." *See* Appendix A, page App. 3.

Following the advertisements of the kits on the Internet, Mr. Perez, by and through his privately owned Delaware corporation, BONDTECH-KLEBRIG CORPORATION, sold thousands of the kits. The method of production and distribution was quite simple. An individual in New York manufactured the kits containing pre-measured ingredients to make GHB, shipped the kits to Mr. Perez's place of operation, his home, where Mr. Perez inserted mixing instructions in the kits and shipped the kits to the customers throughout the United States, via a private courier, FEDERAL EXPRESS.

The United States Food and Drug Administration ("FDA") learned of Mr. Perez's activities and commenced a criminal investigation. At the conclusion of the FDA's investigation, the Government indicted Mr. Perez for violation of Title 21 U.S.C. §§§ 321(g)(1)(B)-(D), 331 and 333 as well as violation of the mail fraud statutes.

The Government and Mr. Perez entered into a plea agreement where he would plead guilty to count one of the Indictment. Mr Perez later entered his guilty plea before the district court below and was sentenced to prison.

On appeal, Mr. Perez contended that his conviction should be vacated because the definition of misbranded drug under the FDC Act is unconstitutionally vague as applied to his case. He also claimed that his guilty plea was not voluntarily, knowingly, or intelligently made, *i.e.*, with a full comprehension check, since he did not know whether he was pleading guilty to a misdemeanor or a felony, requiring his conviction and sentence to be vacated. His last challenge was that the indictment was insufficient because it failed to state a criminal offense, citing GHB was a dietary supplement instead of a drug and, therefore, selling of GHB cannot support a charge of conspiring to violate the FDC Act.

The Eleventh Circuit, recognizing that the issues attacking the FDC Act were of first impression, and the absence of any case law in this Court on the vagueness of the definition of "drug" under § 321 and its affect upon the constitutionality of a prosecution for misbranding drugs with the intent to defraud or mislead under § 331 and § 333, nonetheless affirmed Mr. Perez's conviction and sentence.

This case is now properly before this Court for review.

REASONS FOR GRANTING THE PETITION

Petitioner, JOSE A. PEREZ MENCHACA, respectfully requests this Court to grant the instant petition based on the constitutional challenge to the criminal statutes 21 U.S.C. § 321(g)(1)(B)-(D), § 331 and § 333; that is, the statutes are impermissibly vague as applied to the facts of his case.

The Government charged Mr. Perez with selling "kits" containing gamma butyrolactone ("GBL") to make gamma hydroxybutyrate ("GHB"), all in violation of the Food, Drug, and Cosmetic Act ("FDC Act")(§ 321, § 331, and § 333).

On appeal, the Eleventh Circuit noted that "[w]hether the classification of GHB and GBL as drugs under the FDC Act is proper is an issue of first impression." App. A(4). The appellate court below opined that since Mr. Perez and his company touted GHB and GBL as a cure for alcoholism and depression as well as assisting in the building of muscle mass GHB and GBL clearly and plainly fell within the boundaries of the term "drugs" as defined under the FDC Act. Furthermore, the Eleventh Circuit held that the FDC Act was not unconstitutionally vague as applied to the case *sub judice*, citing that "[n]o case law in th[at] Circuit or in the Supreme Court discusses the vagueness of the definition of "drug" under § 321 and its affect upon the constitutionality of a prosecution for misbranding drugs with the intent to defraud or mislead under § 331 and § 333." App. A(5).

However, the FDC Act, under § 321(g)(1) defines the term "drug" to mean those chemicals or ingredients found in the official Pharmacopoeia or any supplement thereto. GHB and GBL are not referenced or specifically named in any of the official publications cited in the aforementioned criminal statute. Further, the statute does not differentiate between the affects of food and other articles, which could be used to change the function or structure of the body of man or animal.

How then is a reasonable citizen to know what conduct he or she engages in will create the requisite liability under the FDC Act?

Recently, the Tenth Circuit confronted with a challenge to a different section under the FDC Act, held that "the use of the word 'article' [under § 321(g)(1)(A) - (D)] creates ambiguity. . . The drafters could have clarified their intent by using facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710 (1975). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547 (1974). "The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Hoffman Estates v. Flipside Hoffman Estates*, 455 U.S. 489, 495 n.6b, 71 L.Ed. 2d 362, 369 n.7, 102 S.Ct. 1186 (1982)(*quoting Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686 (1971).

This Court has held a statute to be vague when the Government has "fail[ed] to provide such minimal guidelines" that would prevent "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855 (*quoting Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242 (1974)(alterations in the original). The criminal

statute in the instant case is such a law, Mr. Perez contends, because the meanings of the term "drug," "article" and/or "food" are not clear, but plainly ambiguous and vague.

Here, the Legislative enactments failed to articulate the aforementioned terms "with a reasonable degree of clarity to reduce the risk of arbitrary enforcement and allow individuals to conform their behavior to the requirements of the law." *Roberts v. United States Jaycees*, 468 U.S. 609, 629, 104 S.Ct. 3244 (1984).

This Court has on several occasions firmly rejected laws for vagueness. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849 (1999)("Chicago ordinance that prohibited loitering in any public place by two or more people, of whom at least one was criminal street gang member, held to be impermissibly vague, in violation of Fourteenth Amendment's due process clause."); *Kolender*, 461 U.S. 352, 103 S.Ct. 1855 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839 (1972); *Gregory v. City of Chicago*, 394 U.S. 111, 89 S.Ct. 946 (1969); and *Robinson v. State of California*, 370 U.S. 660, 82 S.Ct. 1417 (1962).

Here, this Court as well as a federal circuit and district court have concluded that the term "article" or "drug" or "food" is overly broad and simply vague and ambiguous. *Pharmanex v. Shalala*, 221 F.3d 1151, 1155 (10th Cir. 2000); *Pharmanex v. Shalala*, 35 F.Supp.2d 1341, 1346 (D.Utah 1999); and *United States v. Generix Drug Corp.*, 460 U.S. 453, 103 S.Ct. 1298 (1983).

Mr. Perez could not, nor could any reasonably educated person have concluded, after reading the FDC Act (§ 321(g)(1)), that by placing GBL in a kit, with instructions to make GHB, was prohibited conduct under the law. His guilty plea pursuant to a written plea agreement does not obviate the need to review nor did he waive his right to have this Court reach the constitutional challenge to the FDC Act under the void-for-vagueness doctrine. Instead of using the more precise terms such as 'product' and 'active ingredient' or some combination of the terms, the drafters, opted for the more general expression 'article.' This suggests ambiguity. *Pharmanex v. Shalala*, 221 F.3d at 1155.

In *United States v. Generix Drug Corp.*, the Court held that §321(g)(1) is "plainly broad enough to describe a completed drug product." *Id.*, at 458, 103 S.Ct. 1298. The inclusion of drug product within the ambit of § 321(g)(1) does not resolve the question of the exclusion of drug ingredient, and is thus irrelevant to the question before this Court. The decision in *Generix* and *USV Pharm. Corp. v. Weinberger*, 412 U.S. 655, 664, 93 S.Ct. 2498 (1973), did not elucidate the meaning of "drug" in such a way that precludes a reasonable person to know that the possession of GBL, the ingredient to make GHB, was within the ambit of § 321(g)(1).

The constitutional requirement that laws be reasonably precise as to the scope of prohibited conduct serves three distinct purposes:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly Second, ... [a] vague law impermissibly delegates basic policy matters to policeman, judges, and juries, for resolution on an ad hoc and subjective abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294 (1972)(internal citations and quotations omitted). A statute violates due process of law if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126 (1926). Fair notice, of course, is a right of federal constitutional dimension, grounded in the due process guarantee, established by this Court, and requiring that a criminal statute "give fair warning of the conduct that it makes a crime." *Bouje v. City of Columbia*, 378

U.S. 347, 350, 84 S.Ct. 1697, 1701 (1964); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926)(striking down on due process grounds a state criminal statute that was insufficiently "explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.")

Considering the aforementioned decisions of the federal courts which held the terms "drug," "article," and "food" under the FDC Act are ambiguous at best, it is clear that Mr. Perez' prosecution below violated the due process clause of the Fifth Amendment to the United States Constitution. Mr. Perez urges this Court to find that the FDC Act as applied to the facts of his case is unconstitutionally and impermissibly vague, requiring the judgment of the court below to be vacated.

Failure to inform Petitioner that he is pleading guilty to a misdemeanor or felony constitutes plain error.

Mr. Perez failed to object to the Rule 11 colloquy or move to withdraw his plea prior to sentencing. Hence, he must now show plain error in order to obtain the relief. *See United States v. Chubbuck*, 252 F.3d 1300, 1302 (11th Cir. 2001). Plain error is clear or obvious and affects those substantial rights that call into question the "fairness, integrity, or public reputation of judicial proceedings." *United States v. Hernandez*, 896 F.2d 513, 523 (11th Cir. 1990)(*quoting United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038

(1985)). Mr. Perez bears the burden of persuasion. *United States v. Quinones*, 97 F.3d 473, 475 (11th Cir. 1996)(*per curiam*).

In *Chubbuck*, the Eleventh Circuit opined:

> "After weighing his options, a defendant may for one reason or the other find it advantageous to plead guilty despite potential gaps in the government's ability to present evidence. Therefore in analyzing a guilty plea, the real question in this case is whether the plea was made voluntarily, knowingly, and intelligently."

Chubbuck, 252 F.3d at 1302 (*citing McCarthy v. United States*, 394 U.S. 459, 462-63, 89 S.Ct. 1166 (1969).

No simple or mechanical rule determines whether the district court complied with Rule 11's mandate to satisfy itself that Mr. Perez understood the nature of the charges against him. *McCarthy*, 394 U.S. at 467 n.20, 89 S.Ct. 1166, 1171 n.20. Rather, the inquiry varies from case to case depending on "the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence." *United States v. Bell*, 776 F.2d 965, 968 (11th Cir. 1985).

This Court has recognized that three core concerns underlie a Rule 11: (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the

charges; and (3) the defendant must know the consequences of his plea. A court's failure to address any one of these concerns requires automatic reversal. *McCarthy*, 394 U.S. 459, 89 S.Ct. 1166.

In the case *sub judice*, Mr. Perez's co-defendant had pleaded guilty to certain charges under the indictment (violation of the FDC Act), which, as the record demonstrates and the Government highlighted the Eleventh Circuit on direct review, the conviction was a misdemeanor. Mr. Perez, a native of Argentina, and a first time visitor to the criminal system and courts, pleaded guilty to one of the counts of the indictment, not knowing that the conviction was a felony and would obliterate many of his civil rights as a citizen of this country, *i.e.*, the right to vote, bear arms, the increased social opprobrium that accompanies the higher degree of criminal culpability and conviction assigned to him. The heretofore described consequences, direct or collateral in nature, should have been made known to Mr. Perez prior to the acceptance of his guilty plea by the district court below.

In other terms, it is plain and obvious that the third core concern aforementioned (under Rule 11) was breached, constituting plain error and requiring automatic reversal. *See McCarthy*, generally.

The Eleventh Circuit failed to apply the last prong of Rule 11 (concern) to the facts of Mr. Perez's case below. In light of this omission, but more importantly, the failure by the district court to inform Mr. Perez of the consequences of his

guilty plea and conviction of the charged offense, rendered his plea not knowingly, voluntarily and/or intelligently made, *i.e.*, without a full comprehension check. Having said that, it should be axiomatic that Mr. Perez's conviction is due to be vacated, affording him the opportunity to plead anew.

CONCLUSION

WHEREFORE, Mr. Perez respectfully requests that the Court grant the instant petition for writ of certiorari based on the foregoing argument and law; and enter an order granting same, vacating the judgment of the appellate court below, and remanding the case to the court below for further proceedings consistent with this Court's opinion. Mr. Perez requests other and further relief this Court deems just and proper.

JOSE A PEREZ MENCHACA
FCC-Coleman (LOW)
P.O. Box 1031
Coleman, FL 33521-1031

PETITIONER.